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Supreme Court, U.S.
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No. 04-759

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH OLSON, MONICA OLSON, AND JAVIER VARGAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, the respondents have alleged that the Mine Safety and Health Administration's failure to perform its mandatory duty to inspect a mine resulted in an accident that severely injured them.

The question presented is whether the respondents' complaint, which alleges negligence that would be actionable under the law of the state where the accident occurred if committed either by a state or municipal government or by a private entity, states a claim against the United States under the Federal Tort Claims Act.

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INTRODUCTION

This case involves only the question whether the respondents' claims against the United States under the Federal Tort Claims Act (FTCA) should survive a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). There has, as yet, been no determination that the government is liable to the respondents, let alone of the precise basis (if any) for liability.

Despite the interlocutory posture of the case, the United States has requested that this Court grant certiorari based on what it calls a "clear conflict" between the ruling of the Ninth Circuit and decisions of this Court and other courts of appeals concerning the scope of liability under the FTCA. Pet. 8. The conflict cited by the government, however, is illusory. The Ninth Circuit's precedents make clear that its approach to the FTCA is fully consistent with the general principles cited by the government and applied by other circuits. The Ninth Circuit's ruling in this case reflects only the application to a particular complaint of a very narrow doctrine originally announced 20 years ago, *at the behest of the United States*, in *Louie v. United States*, 776 F.2d 819 (9th Cir. 1985). *Louie* held that in some circumstances involving uniquely governmental functions, state laws involving governmental liability may be pertinent to the liability of the United States under the FTCA. The *Louie* doctrine has since been expressly adopted by at least two other circuits, and, perhaps more importantly, no circuit has rejected it. The fact-bound question whether the doctrine properly applies to mine safety inspections does not merit this Court's review.

Moreover, none of the precedents cited by the government conflicts with the specific holding of the Ninth Circuit in this case: namely, that a plaintiff may state a claim under the FTCA based on the violation by federal employees of a regulatory duty to conduct a mine safety inspection *where state law would make a state or municipal employee liable under like circumstances*. None of the allegedly conflicting

appellate holdings the government cites even addresses this situation, belying the government's claim that this case presents a frequently recurring issue.

In any event, deciding the issue the government poses may prove unnecessary to the resolution of this case. The Ninth Circuit did not address respondents' alternative argument that they could prevail even under the application of the "good Samaritan" standard espoused by the government, which would render the applicability of the *Louie* doctrine to this case a question of merely theoretical interest. Further factual development on remand may indicate that respondents' claims in fact satisfy the "good Samaritan" standard; or it may reveal that their claims do not pass muster even under Arizona tort principles defining the duty of care for government employees who are required to conduct safety inspections. In either event, the issue on which the government focuses will prove non-dispositive. There is certainly no urgent need to take up the issue now, on the bare pleadings and in the absence of a fully developed factual record.

STATEMENT

This case arises out of a terrible accident at the Mission Mine, an underground copper mine operated by ASARCO, Inc., in Sahuarito, Arizona, several miles south of Tucson. On January 31, 2000, respondents Joseph Olson and Javier Vargas were working with another miner, Jose Villanueva, to pack explosives into holes drilled into the ceiling of a portion of the mine, in order to blast loose additional ore-bearing rock. Because of the failure of ASARCO to provide adequate support for the mine ceiling, a nine-ton slab of rock fell from the ceiling as Olson, Vargas, and Villanueva were working. Villanueva was crushed to death, and Olson and Vargas suffered severe, disabling, and permanent injuries.

Petitioners allege that, beginning about a year before the accident, James Kirk, a field supervisor for the Mine Safety and Health Administration (MSHA) in Mesa, Arizona, had

received a series of six anonymous complaints alerting him that the Mission Mine employed inadequate measures to prevent rock falls. Although MSHA policy required him to evaluate all such complaints, later investigations by MSHA and by the Labor Department's Office of Inspector General concluded that Kirk had effectively failed to evaluate the complaints because of his mistaken belief that only signed, written complaints required evaluation.

On September 28, 1999, after Kirk had received the complaints, MSHA mine inspector Alan Varland visited the Mission Mine to conduct an inspection. MSHA is required by statute to inspect each underground mine "in its entirety" at least four times a year. 30 U.S.C. § 813(a). But petitioners allege that despite this requirement — and even though a miner told him during the inspection that ASARCO was not taking sufficient steps to prevent rock falls — Varland did not inspect all of the mine. In particular, he did not inspect parts of the mine that management had barricaded from view, only to reopen them after he left. The accident that killed Villanueva and injured respondents Olson and Vargas occurred in one of the areas that Varland did not inspect.

Olson and Vargas (and Olson's wife, respondent Monica Olson) brought this action against the United States in the U.S. District Court for the District of Arizona to recover for the injuries they suffered as a result of the accident. The complaint alleged that the United States was liable under the FTCA because the plaintiffs' injuries were the proximate result of the negligence of MSHA employees Kirk and Varland in carrying out their mandatory duties to evaluate mine safety complaints and to inspect underground mines. The complaint alleged that:

> Under the circumstances, the defendant United States would be liable under the law of the State of Arizona for personal injury if it were a private person. Alternatively, mine inspection for miner safety is a uniquely governmental activity. Under Ninth Circuit case law,

the test is whether the state or local government would be liable and in Arizona, they would.

The United States moved to dismiss the complaint, and the district court granted the motion. The court ruled, first, that respondents' complaint fell within the "discretionary function" exception to the FTCA, 28 U.S.C. § 2680(a), because the court believed that the duties respondents claimed had been violated involved the exercise of policy-related discretion by Kirk and Varland.

The district court further ruled that even if the discretionary function exception were inapplicable, the FTCA did not provide for liability because, in the court's view, respondents had failed to state a claim that would support recovery under Arizona law if the defendants were private persons. *See* 28 U.S.C. § 2674. The court noted that a private person would be liable under Arizona law for similar negligence under the "good Samaritan" doctrine as set forth in the Restatement (Second) of Torts, § 324A:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Addressing only the first and second prongs of the test, and ignoring respondents' claim that they satisfied the third prong because they had relied on MSHA's inspections to protect them, the district court held that because MSHA had not increased the risk of harm or undertaken to perform the mine owner's own duty to protect respondents, they could not state a viable claim under the Restatement standard.

The district court recognized that under Ninth Circuit precedent, the United States "may be liable under the FTCA 'for the performance of some activities that private persons do not perform,' but only when a state or municipal entity would be subject to liability under the law of the place where the activity occurred." *Concrete Tie of San Diego, Inc. v. Liberty Constr., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997) (quoting *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995)). The district court also acknowledged that under Arizona tort law, a state or local government entity could be liable for negligently performing a required safety inspection. *See Daggett v. County of Maricopa*, 770 P.2d 384 (Ariz. App. 1989); *Diaz v. Magma Copper Co.*, 950 P.2d 1165 (Ariz. App. 1997). The court, however, thought that respondents had not alleged any failure by MSHA to perform any duty that it was *required* to undertake; thus, the court concluded, respondents had not alleged any negligence that would be actionable if committed by an Arizona governmental entity.

The Ninth Circuit reversed. *Olson v. United States*, 362 F.3d 1236 (9th Cir. 2004). The court held that the discretionary function exception did not apply because respondents alleged the breach of nondiscretionary duties by MSHA employees — specifically, Kirk's failure to take the required step of evaluating all mine safety complaints and Varland's failure to inspect the mine in its entirety. The government no longer disputes this point, although the discretionary function exception was its principal defense in the courts below.

As for whether respondents had alleged a tort actionable under Arizona law, the court began with the proposition that "[g]enerally, the United States can be held liable under the FTCA only when liability would attach to a private actor under the law of the place where the tort occurred." 362 F.3d at 1240. The court did not, however, reach respondents' argument that they had stated a claim that a private party would be liable to them under like circumstances under Arizona's

"good Samaritan" doctrine because they alleged that they had relied on MSHA's inspections to protect them. Rather, the court invoked prior decisions holding that "the United States may be liable '"for the performance of some activities that private persons do not perform," ... when a state or municipal entity would be held liable under the law where the activity occurred.'" *Id.* (quoting *Concrete Tie*, 107 F.3d at 1371 (quoting *Hines*, 60 F.3d at 1448)).

Applying this principle here, the court held that there was no private-sector analogue for regulatory mine inspections because private parties lack regulatory authority; thus, such inspections were a uniquely governmental function. The court further held that under Arizona law, which strictly limits its governmental immunity doctrines, a state or municipal government could be held liable for violation of the failure to perform a mandatory mine safety inspection. *Id.* (citing *Diaz*, 950 P.2d 1165). Because respondents had alleged a breach of mandatory duties by MSHA, the court concluded that they had stated a claim under the applicable state tort law principles. *Id.* at 1241.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Opinion Does Not Conflict with Decisions of this Court or Other Circuits.

A quick review of the government's petition for certiorari leaves the reader with the impression that the Ninth Circuit's decision conflicts not only with decisions of this Court, but also of virtually every other circuit. But a closer reading reveals that the government cites *not a single conflicting precedent* that actually decided the issue addressed by the Ninth Circuit in this case: namely, whether the federal government can be held liable under the FTCA for negligent performance of a government function (here, regulatory inspections) under circumstances where a state or local government would be liable under the tort law of the state where the negligent acts were performed. The Ninth Circuit's analysis of

that issue does not conflict with the holdings of this Court's leading precedents, nor with the law of other circuits.

A. The Ninth Circuit Has Not Rejected the Teachings of *Indian Towing* and *Rayonier*.

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), this Court rejected the effort of the United States to claim *immunity* from liability under the FTCA for the performance of uniquely government activities (in that case, operation of a lighthouse). Emphasizing that "[t]he broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities like unto those in which a private person would be liable," *id.* at 68-69, the Court refused to permit the government to "import immunity back into a statute designed to limit it." *Id.* at 69. Accordingly, the Court held in *Indian Towing* that if state law permitted liability to be imposed on a private person for similar or analogous activities, the federal government could not claim immunity on the ground that a state or municipal government would be immune under state law. *Id.* at 65. The Court did *not* hold — because the question was not even remotely presented — that the federal government must be excused from liability under the FTCA in circumstances where the law of the relevant state would impose liability on a state or municipal government.

Similarly, in *Rayonier Inc. v. United States*, 352 U.S. 315 (1957), the Court rejected the federal government's effort to import state governmental immunity into the FTCA. There the plaintiffs sought to impose liability on the United States for the negligence of the Forest Service in fighting a fire on federal land in the state of Washington. The government countered by arguing that under Washington law, firefighters employed by state and local governments were immune from tort liability. The federal government claimed that same immunity even though it would be denied to private persons under Washington law.

Once again, the Court found the government's assertion of immunity to be inconsistent with what it saw as the purpose of the FTCA: "to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Id.* at 319. But in holding that it would not excuse the federal government from liability based on state and local governmental immunity, the Court nowhere suggested that if state law *imposed* a duty of care on state and local governments, the federal government could escape liability by arguing that the duties of private persons under state law were narrower — an entirely different proposition (indeed, almost the opposite proposition). Any such suggestion would be hard to square with the Court's emphasis on the Act's purpose of imposing "novel and unprecedented governmental liability."

The government's assertion that the Ninth Circuit has somehow rejected the holdings of *Indian Towing* and *Rayonier* is incorrect. The Ninth Circuit's leading recent precedent on the issue, *Anderson v. United States*, 55 F.3d 1379 (9th Cir. 1995), faithfully follows *Indian Towing* and *Rayonier* in holding that the federal government is not entitled to claim state-law based governmental immunities if there is any analogous private activity for which state tort law would impose liability. *Id.* at 1381-84 (citing *Indian Towing* and *Rayonier*);[1] *see also Delta Savings Bank v. United States*, 265 F.3d 1017, 1026 (9th Cir. 2001) (finding no FTCA liability where there was no analogous state-law tort duty; citing *Indian Towing*), *cert. denied*, 534 U.S. 1082 (2002). Ninth Circuit doctrine as set forth in *Anderson* and *Delta Savings* is

[1] In light of the government's current contention that it is the *Ninth Circuit* that has ignored *Indian Towing* and *Rayonier*, it is ironic that in *Anderson*, nearly 40 years after the Court decided *Indian Towing* and *Rayonier*, the *government* was still arguing that it was entitled to immunity for precisely the same conduct at issue in *Rayonier* — fighting forest fires.

fully consistent with the precedents that the government touts as stating the correct rule, such as *Howell v. United States*, 932 F.2d 915 (11th Cir. 1991), which states that the federal government will be liable if a private person would be liable under the "closest state law analogue." *Id.* at 918.

B. The Ninth Circuit's Ruling Reflects Application of a Narrow Doctrine Created at the Behest of the United States and Accepted by Other Circuits.

In *Louie v. United States*, 776 F.2d 819 (9th Cir. 1985), the Ninth Circuit accepted the urging of the United States to create a narrow corollary to the doctrine of *Indian Towing* and *Rayonier*: in certain cases involving functions that private persons do not perform, "the inquiry into the [federal] government's liability" under the FTCA "must include an examination of the liability of state and municipal entities 'under like circumstances.'" *Id.* at 825. In *Louie*, the specific question was whether the government was liable for failing to detain an off-duty serviceman accused of drunk driving (an action that, if the government had taken it, would have prevented the serviceman from causing a fatal traffic accident). The court excused the federal government from liability because the case involved the performance of a law enforcement function, and state law would not have imposed liability on a state or municipal law enforcement agency in such circumstances. *Id.* at 825-26.

The *Louie* doctrine, originally advocated by the federal government for its own benefit, has been applied by the Ninth Circuit for twenty years. Indeed, the government invoked *Louie* successfully again in *Aguilar v. United States*, 920 F.2d 1475 (9th Cir. 1990), which held that in an FTCA action based on a federal employee's performance of law enforcement functions, the United States was entitled to the benefit of the cap on damages Nevada law imposed on tort actions against state and local police officers (even though that cap did not apply to actions against private persons). *Id.* at 1477-78 (citing *Louie*). The Ninth Circuit has also long

applied *Louie* in other cases where the analogy to state or municipal liability supports the imposition of liability on the federal government. *See Doggett v. United States*, 875 F.2d 684 (9th Cir. 1989); *Hines*, 60 F.3d 1442; *Concrete Tie,* 107 F.3d 1368. Then-Judge Kennedy endorsed the doctrine in his concurring opinion in *Gallea v. United States*, 779 F.2d 1403 (1986), where he observed that "in cases involving unique governmental functions … we seek to determine what liability state law attaches to similar activities undertaken by analogous entities subject to its jurisdiction." *Id.* at 1406-07 (Kennedy, J., concurring) (citing *Louie*).

Far from rejecting the *Louie* doctrine, other circuits have affirmatively adopted it. In *Crider v. United States*, 885 F.2d 294 (5th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990), the issue was whether the United States was liable for the consequences of a park ranger's negligent failure to make an arrest. In holding that Texas law did not impose such liability, the court examined the duties imposed on state and municipal police by Texas tort law principles. As the court explained:

> Under the special circumstances involved, we think the government got it right in *Louie*. We are not looking to state law insofar as it immunizes a public entity from liability; rather, we are seeking 'like circumstances' which best articulate a state's negligence law.

Id. at 296. The court emphasized that the application of *Louie* did not violate the principles of *Rayonier* and *Indian Towing* because it did not involve the creation of a *per se* defense or immunity based on the performance of a uniquely government function, but only resulted in an inquiry into whether state tort law recognized a *duty* in "like circumstances." *Id.* at 297.[2]

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[2] *Accord*, *Stuart v. United States*, 23 F.3d 1483, 148 (9th Cir.), *cert. denied*, 513 U.S. 947 (1994) (emphasizing that *Louie* does not import state-law immunities into the FTCA).

Similarly, in *Hetzel v. United States*, 43 F.3d 1500 (D.C. Cir. 1995), the D.C. Circuit adopted the *Louie* approach to cases involving the liability of the federal government to persons injured by federal employees engaged in law enforcement functions (specifically, in *Hetzel*, high-speed car chases). Citing Ninth Circuit precedents including *Doggett*, *supra*, the court stated:

> Other courts confronting the issue of FTCA liability in the law enforcement context have abandoned the private individual analogy and looked to the standards of care applicable to government employers under state law. … We adopt this approach.

Hetzel, 43 F.3d at 1503-04. The result in *Hetzel* (as in the case below) was federal liability, because the law of the District of Columbia imposed a duty of care on D.C. police officers in like circumstances. *See id.* at 1504-07; *see also id.* at 1507 (Williams, J., concurring).

Perhaps more telling than its express adoption by the Fifth and D.C. Circuits is that in the 20 years the *Louie* doctrine has been in existence, *no federal court of appeals has rejected it*. If the doctrine were truly as pernicious and irreconcilable with the statute, this Court's precedent, and other federal case law as the government now suggests it is, surely someone would have noticed before now. But the government cites no cases in which another court of appeals has expressed disagreement with the *Louie* doctrine, and our own searches of federal precedents have revealed no such cases.

C. The Ninth Circuit's Decision Does Not Conflict with Other Appellate Decisions That Find No Liability Under State-Law Principles for the Performance of Inspections.

The government asserts that the decision below conflicts with decisions of the Sixth and Tenth Circuits declining to impose liability on the United States for negligent MSHA inspections, and with decisions of other circuits that have

turned to state tort doctrines applicable to the activities of private persons to determine the government's liability for negligent inspections. In none of those cases, however, did the courts consider and reject imposition of liability where state tort law imposed a duty and created liability for similarly situated state or local government entities. The decisions thus are not in conflict with the outcome below. They simply reflect the inevitable consequence of a regime that makes federal liability dependent on state tort law: Outcomes of cases will vary from state to state depending on the contours of state liability principles.

The government places its principal reliance on the Sixth Circuit's decision in *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982). But *Raymer* was just a straightforward application of *Indian Towing* and *Rayonier*. The applicable state law in *Raymer* (that of Kentucky) did not impose tort duties on state or municipal inspectors similarly situated to the MSHA; it granted them an immunity, on which the United States sought to rely. *Id.* at 1140-42. Rejecting the government's argument as inconsistent with *Indian Towing* and *Rayonier*, the Sixth Circuit turned instead to the "good Samaritan" doctrine as the most analogous principle of Kentucky law, and held that on the facts before it (which had been determined through a trial in the district court) the plaintiffs did not satisfy the requirements of that standard. *Id.* at 1140-44. The court did not consider whether a state tort doctrine imposing liability on a government entity for similar inspections would support a finding of liability, because (unlike in this case) there was no such doctrine. Indeed, the court specifically noted that "no cause of action for such an omission by a governmental agency had ever been recognized in Kentucky," *id.* at 1141, an observation that suggested, consistent with the *Louie* doctrine and the decision below, that the outcome might have

been different if Kentucky had recognized such a cause of action.[3]

Similarly, in *Ayala v. United States*, 49 F.3d 607 (10th Cir. 1995), where the Tenth Circuit found no actionable breach of duty by MSHA under Colorado law, there was no Colorado authority that would have imposed liability on a state or local government authority (or on a private person) for a similar activity. *See id.* at 611-13. Indeed, in finding that Colorado law imposed no tort duty on a defendant in MSHA's position, the court placed principal reliance on Colorado cases finding that state and local government entities had no liability for failure to carry out statutorily imposed duties. *Id.* at 612 (citing *Board of County Comm'rs v. Moreland*, 764 P.2d 812, 817 (Colo. 1988) (rejecting tort remedy against county for breach of obligation to enforce building code), and *Quintano v. Indus. Comm'n*, 495 P.2d 1137, 1139 (Colo. 1972) (rejecting tort remedy against state industrial commission for breach of statutory duties)). If the government's theory were correct, of course, the Tenth Circuit should not have relied on those decisions at all, and there is nothing in the Tenth Circuit's opinion to suggest that it would disagree with the Ninth Circuit in circumstances where state law (unlike the applicable Colorado state law in *Ayala*) imposed tort duties on comparable state and local government entities.

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[3] *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994), a subsequent Sixth Circuit case following *Raymer* that the government cites in passing (Pet. at 15), similarly involved circumstances where there was no analogous principle of tort liability that would be applicable to state or local government officials under Tennessee law. The only case that even arguably suggested such liability was one involving a state official's liability on a bond required by state statute, which was clearly not an appropriate analogy given the absence of such a requirement for MSHA officials. *See id.* at 900. The court in *Myers* noted that it was more relevant that Tennessee case law indicated that state and local officials were generally not liable for breach of statutory duties. *See id.* at 900 n.12.

Outside the immediately relevant context of MSHA inspections, the government also places great emphasis on two Eleventh Circuit decisions, *Howell*, 932 F.2d 915, and *Pate v. Oakwood Mobile Homes, Inc.*, 374 F.3d 1081 (11th Cir. 2004). Once again, however, the government rests its case on precedents that do not directly address the issue of whether state tort doctrines imposing duties on state and local government entities can serve as a basis for FTCA liability. In *Howell*, the court began by rejecting the notion that the government was immune from liability because it was performing a uniquely governmental function (regulating air traffic), and looked to "the closest state law analogue," which in that case was the "good Samaritan" doctrine. 932 F.2d at 918. Because there was apparently no argument that a state or local government would be liable under Georgia law for similar activities, the court did not address whether such liability could provide an appropriate "state law analogue" for FTCA purposes.

Similarly, in *Pate*, the court was not called on to decide whether the federal government would be liable under circumstances where a state or local government would be liable under Georgia law, as the only possible analogues provided by Georgia law were the "good Samaritan" doctrine or liability for failure to warn of a hazard the government itself had created (neither of which, the court held, supported liability on the facts of the particular case). 374 F.3d at 1084-87. In short, neither *Howell* nor *Pate* held that the federal government could not be held liable under circumstances where state law would impose liability on a governmental entity.

The remaining cases cited by the government (*see* Pet. at 16) are even further afield: They amount to no more than instances in which courts have quoted the language of the FTCA. None involved a holding on the issue presented here.

D. The Ninth Circuit Has Not Created a Doctrine of Liability for Breach of Federal Statutory Duties Divorced from Principles of State Tort Law.

Unable to cite appellate decisions that reject the *Louie* doctrine or conflict directly with the decision below, the government asserts that "at a broader level," the decision below is irreconcilable with "a host of decisions" holding that the FTCA does not itself create liability, independent of state tort law, for breaches of federal statutory duties. Pet. at 19. The law of the Ninth Circuit, however, is fully consistent with this principle. Indeed, a recent decision by the same judge who wrote the opinion below expressly reiterated that "[t]he breach of a duty created by federal law is not, by itself, actionable under the FTCA." *Delta Savings Bank*, 265 F.3d at 1024 (quoting *Love v. United States*, 60 F.3d 642, 644 (9th Cir. 1995)). Nothing in the decision below is to the contrary: It does not impose liability on a negligence *per se* theory for the mere violation of a federal statutory duty, but only holds that where state tort law imposes a duty on a similarly situated entity, FTCA liability may also follow. That holding is fully consistent with the fundamental principle that "the source of substantive liability under the FTCA" is "law of the State." *Id.* (quoting *FDIC v. Meyer*, 510 U.S. 471, 478 (1994)).

II. There Are No Strong Reasons to Review This Case.

The government's contention that this case presents a "recurring question of fundamental importance" (Pet. at 20) is as unpersuasive as its claims of decisional conflict. As the analysis of the case law presented above indicates, there have been very few cases where the *Louie* doctrine has been applied to impose liability on the United States because state tort law imposes liability on state and local governments in the same circumstances. That is undoubtedly because state law typically treats governmental entities *more favorably* than private persons for liability purposes. Thus, it will be the rare case where the *Louie* doctrine will result in a decision

adverse to the federal government in circumstances where the application of state tort law principles concerning private persons would not.

Moreover, as the government itself acknowledges, most cases involving the *Louie* doctrine have arisen in the context of the government's performance of law enforcement functions — and the government itself apparently continues to believe that *Louie* may appropriately be applied to such cases. *See* Pet. at 18 n.7. The reason for the government's view on that point may be that it has at least as much to gain from *Louie* in those circumstances as it has to lose, but whatever the reason for the government's position, its effort to place those cases in a separate category significantly reduces the degree to which the issue is recurring and important.

As for the government's contention that the Ninth Circuit's decision places it at the mercy of "each State's policy decisions," Pet. at 21, that is not a result of the *Louie* doctrine. Rather, it is an inherent consequence of the FTCA, which makes federal liability dependent on state tort law. *See Rayonier*, 352 U.S. at 318-20. Moreover, given the tendency of state law to be more protective of state and local governments than of private persons, the idea that the *Louie* doctrine will add significantly to the burdens already imposed on the federal government by the FTCA's incorporation of state-law liability principles is farfetched.

III. The Interlocutory Posture of the Case and the Existence of Alternative Grounds for Decision Make This Case Particularly Unsuitable for Review.

Finally, the Ninth Circuit did not rule on respondents' alternative argument that even under Arizona's "good Samaritan" doctrine as applicable to inspections conducted by private persons, they stated a claim under Restatement § 324A because they alleged reliance on the MSHA's performance of

its duties.[4] The district court, in its decision dismissing their claims, had mysteriously failed to address this allegation, which respondents had supported with sworn affidavits. Respondents' allegation of reliance is, by itself, an alternative basis for affirming the Ninth Circuit's holding that respondents' case should survive the government's motion to dismiss for failure to state a claim. Moreover, should the evidence bear out the allegation of reliance following remand to the district court for discovery and trial, the *Louie* issue would effectively drop out of this case entirely.

Of course, if respondents ultimately were to fail to prove their allegations of negligence against MSHA on remand, the *Louie* issue would also become purely academic. On the other hand, should respondents prevail in the end on the basis of the *Louie* doctrine, the issue could be reviewed by this Court (if review were otherwise warranted, which it is not) following an appeal from a final judgment. The possibility that the issue may disappear once the case proceeds to a final judgment, together with the certainty that, even if it does not disappear, decision of an important question of law would be better informed by a full factual record, strongly weighs against decision of the case at this interlocutory stage. As the United State itself is fond of pointing out:

> Even when an important threshold question has been decided by a court of appeals, this Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). That customary prac-

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[4] In *Raymer*, the Sixth Circuit, following a full trial, held that the plaintiffs had not pleaded or proved reliance (660 F.2d at 1143), and in *Myers* the court also noted that the plaintiffs had not pleaded reliance. Here, by contrast, respondents have pleaded reliance, and it would be premature to conclude that there is no state of facts on which they could prevail on that ground.

tice is well-suited for the interlocutory petition in this case.

Brief for the United States as Amicus Curiae 17, *Duke University v. Madey*, No. 02-1007 (May 2003); *see also* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (citing this Court's practice of reviewing interlocutory decisions of the federal courts of appeals only in extraordinary cases). No extraordinary circumstances compel immediate review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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